

The Lamfalussy Reform in the EU Securities Markets: Fiduciary Relationships, Policy Effectiveness and Balance of Power

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ABSTRACT

In 2000 a Committee of Wise Men chaired by Alexandre Lamfalussy, former president of the European Monetary Institute was appointed by the Economics and Finance Ministers Council to make recommendations on the regulation of the European securities markets. It proposed a four-level system to improve the legislative process while ensuring what it called a democratic and institutional balance. Our paper questions to what extent the concepts of two basic modes of delegation – agency and trust relationships – are appropriate tools to interpret the new structure set up by the Committee. It formulates hypotheses about its policy effectiveness and the balance of power between Community institutions. Evidence supports the agency hypothesis: the Lamfalussy process has reduced the average time taken to negotiate and adopt the first framework directives at level 1 and it has facilitated the removal of bottlenecks in the process through parallel working at levels 1 and 2. In this sense, delegation has enhanced policy effectiveness in the securities sector. But it is much more difficult to assess the trustee hypothesis: that is, whether the Commission and the Committee of European Securities Regulators (CESR) in fact act as trustees of the member states for the benefit of market actors. For the time being, whether CESR might evolve into a European securities regulator remains an open question.

Introduction

Financial services, i.e. the banking, insurance and investment services (securities and investment funds) sectors, formed one of the policy areas where the single market was still incomplete in 1993 (Young 2005: 109); this was especially true in the investment services sector.² According

to Article 8A of the Treaty establishing the European Economic Community (EEC) as revised by the Single European Act, the EEC financial markets were to be integrated by 31 December 1992. Legislation had been in force since 1964 (Directive 64/225/EEC), but differences in national regulations, on the one hand, and the sensitivity of these fields due to their impact on the economy and savings, on the other, curbed its development.

During the process of the introduction of the euro, financial markets again came to the forefront (Commission 2005b: 5). This led the European Council of Cardiff to request, on 15–16 June 1998, that the Commission establish a framework for action to improve the single market in financial services. This framework, adopted by the Commission on 28 October 1998, listed several points of action and proposed the creation of a Financial Services Policy Group (FSPG),³ which would ‘identify and prioritise a set of actions by June 1999 to be presented to the Council ... [and] define a number of immediate priorities to guarantee momentum to the process’ (Commission 1998: 25, points 58 and 59). Based on the recommendations of the FSPG and the Framework for Action, the Commission then drafted the Financial Services Action Plan (FSAP) (Commission 1999: 19–31), which contained forty-three measures to be taken to further the integration of EU financial markets. Backed by the European Council of Cologne on 3–4 June 1999, the FSAP had to be implemented by 2005, the deadline set by the European Council of Lisbon on 23–24 March 2000.

With this goal, and taking account of the institutional dispute between the Commission, the Council and the European Parliament on the creation of a Committee on Transferable Securities,⁴ the Economics and Finance Ministers (ECOFIN) Council appointed a Committee of Wise Men on the Regulation of European Securities Markets (CWM) on 17 July 2000 to assess how best to adapt securities regulation and the co-operative mechanisms between national regulators to market evolution (such as alternative trading systems) and to ensure a more effective transposition and implementation of the regulation. The Committee was chaired by Alexandre Lamfalussy, former president of the European Monetary Institute and member of the Segré Committee on the development of a European capital market (Commission 1966: 5).

In its initial report, the Committee of Wise Men identified the functioning of the institutional framework as the main shortcoming of the Community regulation: it was too slow; the texts adopted were sometimes ambiguous; transposition deadlines were often not respected; some sensitive issues were not covered properly (pension funds, international accounting standards and the European company statute, for instance); there was no mechanism with which to update the legislation rapidly;

and the obligations to co-operate were insufficient (CWM 2000: 18–19). As was mentioned in the final report, ‘the problem is the system itself’ (Ibid.: 13). The Committee therefore proposed a four-level system that would speed up the legislative process and provide Community institutions with the expertise of European regulators, while maintaining a democratic and institutional balance (Ibid.: 24–5). The system was agreed by the ECOFIN Council on 22 March 2001 and mostly endorsed by the European Council of Stockholm on 23–24 March 2001⁵ and the European Parliament on 5 February 2002.

The relevance of the analysis of this new regulatory framework stems from the fact that it might be considered a model for the transformation of EU governance in other policy areas,⁶ in line with the Commission White Paper on European Governance (Commission 2001a: 33–4). The present article seeks to describe and interpret the Lamfalussy reform in the securities sector from the theoretical perspective developed in the introduction to this special issue. Our argumentation is structured as follows. The first section briefly presents the Lamfalussy reform. It summarises the policy process according to its four-level approach (CWM 2001: 19), presenting the actors and the institutional safeguards. The second section focuses on the configuration of actors involved in the Lamfalussy scheme. It sheds light on the fiduciary delegation mechanisms,⁷ suggesting that both the agency model and the trust model are useful in understanding the relationships between these actors at the various decision-making and implementation phases. The third section formulates three working hypotheses on the policy effectiveness of the Lamfalussy scheme and the resulting balance of power between the Commission, the Council and the European Parliament. The first hypothesis argues that the status quo might continue to prevail if the member states predominate. In the agency hypothesis, policy effectiveness should, on the contrary, increase and the balance of power tilt in favour of the European Parliament. The trust hypothesis also posits an increase in policy effectiveness, but a balance of power in favour of the Commission. The fourth section concludes with an initial empirical test of these three hypotheses.

1 The Lamfalussy reform

In its report of 15 February 2001, the Committee of Wise Men proposed the introduction of a four-level system for adoption of framework legislation (level 1-L1), adoption of implementing measures (level 2-L2), consistent and equivalent implementation (level 3-L3) and monitoring of the enforcement of the Community legislation in the securities sector (level 4-L4) (CWM 2001: 19).⁸ This system is based on the extensive use

of comitology⁹ and consultation with market practitioners (intermediaries), end-users (issuers of securities) and consumers (investors) (Lamfalussy 2001: 12; CWM 2001: 6, 32).

At L1, the initiation phase, the Commission adopts a proposal for a directive or a regulation after a full consultation process of market actors (CWM 2001: 25). The proposal is thereafter sent to the European Parliament and the Council, which adopt, according to the co-decision procedure, the legislative act containing the framework principles and the definition of the implementing powers to be conferred on the Commission.

At L2, the implementing powers phase, the Commission adopts the measures implementing the L1 directive or regulation on the basis of the comitology process established in Council Decision 1999/468/EC.¹⁰ Before proceeding with the elaboration and adoption of L2 measures, the Commission first consults the European Securities Committee (ESC), which is the relevant regulatory committee in the field of securities.¹¹ The ESC was created by a Commission decision on 6 June 2001 (2001/528/EC). In addition to its regulatory committee function, the ESC is also a policy advisor, notably on projected L1 legislation and on Commission services mandates (CWM 2001: 6, 29). The ESC comprises representatives of the member states and is chaired by a representative of the Commission services. Before the ESC was created, there was no effective L2 committee.¹² Next, the Commission also requests advice from the Committee of European Securities Regulators (CESR), which is an independent advisory group composed of national regulators designated by their respective member state. More specifically, following a mandate granted by the Commission, CESR prepares technical advice in consultation with market practitioners, end-users and consumers, and forwards it to the Commission. On the basis of this advice, the Commission draws up draft implementing measures, which are then submitted to the ESC for vote. The Commission adopts the implementing measures once the ESC has approved them.

If the ESC does not approve the measures or does not deliver an opinion, the implementing measures are referred to the Council, which has two main options. Firstly, it can adopt them by a qualified majority vote, or not adopt them while not opposing them; in the second case, the measures are adopted by the Commission. Secondly, the Council can prevent their adoption by a qualified majority vote. In that case, the Commission can submit amended implementing measures to the Council, submit the initial draft measures anew or submit a legislative proposal to the Council and the European Parliament (Council Decision 1999/468/EC, Art. 5, §§4, 6). During the L2 process, the European Parliament is kept fully informed of the development of the implementing

measures (CWM 2001: 36). In accordance with its right of scrutiny and if the case arises, the European Parliament can indicate in a resolution that the draft implementing measures the Commission has submitted to the ESC for approval exceed the powers conferred on the Commission in the basic instrument. Such a resolution is, however, not binding, the Commission being able to continue to request a vote from the ESC if it deems it necessary (Council Decision 1999/468/EC, Art. 8). The procedure for regulatory committees adds that the European Parliament informs the Council of its position, which can take it into account when deciding whether or not to adopt the referred measures (Art. 5, §§5, 6). The right of scrutiny was explicitly mentioned in the Lamfalussy reform (Ibid.: 30).

At L₃, the implementation phase, CESR works to ensure that convergent application and day-to-day practice are established in the member states. For instance, it issues administrative guidelines, joint interpretation recommendations and common standards in areas not covered by Community legislation. CESR was created by a Commission decision on 6 June 2001 (2001/527/EC). A member of the latter is entitled to participate in all meetings, unless they deal with confidential matters (CESR 2006: Art. 3, §1). The work is prepared by expert groups established on a non-permanent basis and by permanent groups (Ibid.: Art. 5, §§3, 4).

Finally, at L₄, the enforcement phase, the Commission monitors consistent transposition and subsequent application of measures adopted at L₁ and L₂. The Commission exercises its function as guardian of the Treaty establishing the European Community by checking the compliance of the member states with Community legislation and, if necessary, starting proceedings for failure to fulfil an obligation if a breach is suspected (EC Treaty, Arts. 226, 228; CWM 2001: 6, 27, 36–7, 39).

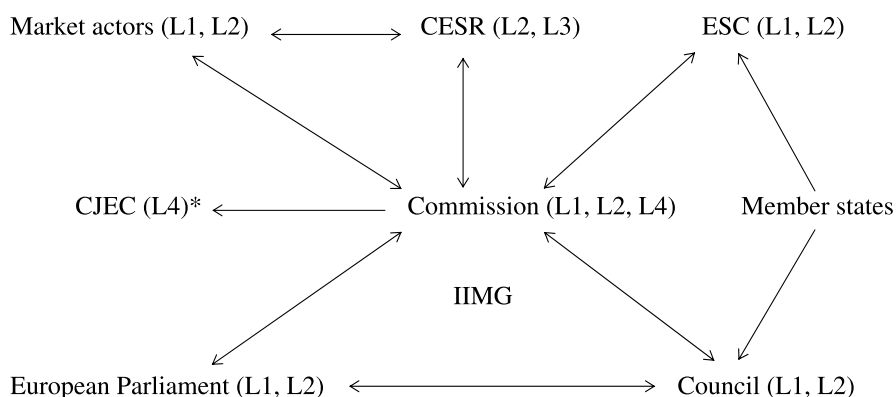
The Lamfalussy process was formally extended to banking, insurance and occupational pensions, and UCITS in 2005, but its application differs according to the financial sector (IIMG 2006: 7; 2007: 3). In the securities sector, four directives have passed through that legislative process: Transparency (2004/109/EC), Prospectus (2003/71/EC), Market Abuse (2003/6/EC) and Markets in Financial Instruments (MiFID; 2004/39/EC). However, in the banking sector, the activities of the Committee of European Banking Supervisors (CEBS) have concentrated on the implementation at L₃ of the Capital Requirements Directive (CRD; 2006/48/EC and 2006/49/EC), which is not a Lamfalussy directive. Furthermore, in the insurance sector, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) was involved at L₁ in the technical aspects of the Solvency

II project, which led to a Lamfalussy directive proposal on 10 July 2007.¹³

The final element of the Lamfalussy structure to be established was the Inter-Institutional Monitoring Group (IIMG), created in July 2002. The IIMG consists of six independent experts appointed by the Commission, the Council and the European Parliament (two representatives each).¹⁴ Its task is to evaluate the implementation of the Lamfalussy process in terms of effectiveness and detect possible dysfunctions (IIMG 2003: 4, 16). It produced three reports between 2003 and 2004. Following the above-mentioned extension of the Lamfalussy process to the other financial sectors, the IIMG was re-established under an extended mandate to consider developments in the three sectors (banking, insurance and investment services). The relationships between the actors of the process is summarised in Figure 1.

From the point of view of new modes of governance (see Héritier and Lehmkuhl, in this issue), in the Lamfalussy process, both public (national securities regulators) and, to a lesser extent, private actors (market actors) are entitled to participate in policymaking in a functionally clearly delimited area, that of securities, later extended to the whole of the financial services sector. This reform falls within the scope of the 2001 White Paper on European Governance; it has in addition brought about adjustments in favour of both the Council and the European Parliament.

Three control mechanisms have been added to the original Lamfalussy model at L2. Firstly, in order to secure an agreement on the Lamfalussy reform,¹⁵ the Commission reaffirmed to the ECOFIN Council, on 22



*Court of Justice of the European Communities

FIGURE 1. *Relationships between policy actors in the Lamfalussy reform*

March 2001, its commitment not to go against ‘predominant views’ within the Council¹⁶ when passing L2 measures. This clause is known as the ‘aerosol clause’ (IIMG 2003: 14, 40). The European Parliament considered it was therefore no longer treated on an equal footing with the Council and requested more rights in addition to its right of scrutiny. A compromise was reached and confirmed in the declaration by Romano Prodi, President of the Commission, to the European Parliament on 5 February 2002 (Commission 2002a). It was decided, secondly, that each L1 directive or regulation adopted under the Lamfalussy process would include a ‘sunset clause’, that is to say, a clause limiting to four years (from the entry into force of the directive or regulation) the time the Commission has to exercise implementing powers. Thirdly, it was agreed that the European Parliament would have a three-month period (except in urgent cases) from the transmission of any draft implementing measures to react to them and, if need be, indicate that they exceed the implementing powers delegated to the Commission. The European Parliament would also continue having a one-month period (except in urgent cases), from the transmission of final draft measures, to indicate that the Commission has exceeded its implementing powers.¹⁷ However, it was not granted the ‘call-back right’ it regarded as the equivalent of the aerosol clause for the Council. That right would have allowed the European Parliament to block the adoption of implementing measures (IIMG 2003: 14–15, 40–1). A provision granting a general call-back right to the European Parliament was inserted in the 2004 Treaty establishing a Constitution for Europe (Art. I-36, §2(a)), but due to its rejection in France (29 May 2005) and the Netherlands (1 June 2005) it had not entered into force.¹⁸ As a result, new discussions between the Commission, the Council and the European Parliament on the reform of comitology started in September 2005,¹⁹ leading to the creation of a new type of comitology committee, the ‘regulatory procedure with scrutiny committee’ (Council Decision 2006/512/EC, Art. 1, §7). This type of committee gives the European Parliament the right to oppose the adoption of draft measures implementing directives or regulations adopted under the co-decision procedure. The deadline for such a decision is three months following the referral to the European Parliament of measures approved by the regulatory committee with scrutiny, or four months following the referral to the Council of measures which were not approved or on which the committee did not deliver an opinion.²⁰ It applies only to future directives. In order to apply this procedure to already existing directives, the Council and the European Parliament have called upon the Commission to come forward with an alignment proposal. The new procedure, establishing equal control rights for these two institutions, renders the use of sunset clauses unnecessary.²¹

II Interpreting the new regulatory framework: agency or trust modes of delegation?

The following section seeks to identify whether the relationships between the actors involved in the securities regulation after the Lamfalussy reform occur within an agency or trust model.

There are two reasons for choosing these approaches. Firstly, the Lamfalussy reform develops the practice of delegation of tasks, on account of the technicality of securities policy. For that purpose, the Commission relies on the advice of the ESC and CESR acting within their respective ambit. Secondly, agency and trust are two basic modes of delegation, which are complementary approaches to the study of EU governance: ‘while agency theory can be legitimately used to analyse the comitology system – i.e. the system of control by committees of national representatives – in areas where the Commission has been delegated implementing powers . . . the same theory cannot satisfactorily explain the treaty-based independence of the Commission in initiating legislation and in monitoring compliance with European law by the member states. The real purpose of delegating such autonomous powers, it should be noted, is to enhance the credibility of the member states’ commitment to the integration process’ (Majone 2001: 104).

Methodologically speaking, the agency and trust models view actors as acting as a whole; this does not mean that before reaching a decision institutions are not subject to diverging interests. For instance, the Council may experience struggles between member states, each representing the financial interests of its own companies. Key centres such as London, Paris, Frankfurt and Amsterdam are in competition with each other. Furthermore, London, the most important of them, sees itself as a wholesale market for professionals competing in a global market place; this gives it a different perspective on regulation when compared with member states where the regulator is concerned with domestic retail investors.

1. Agency relationship

Agency theory is derived from the law of contracts. Under the American Third Restatement of the Law of Agency, *agency* is defined as ‘the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests consent or otherwise consents so to act’ (§1(1)).²² The fact that agency is a fiduciary relationship implies that the interest of the principal prevails over that of the agent.²³

The concept of agency was applied in economics (Berhold 1971) and political science (Mitnick 1973) in the 1970s (Kiser 1999: 149; Shapiro

2005: 271). Several political situations can be characterised as principal-agent relationships. For example, the ideal type of parliamentary democracy has been illustrated by a chain of delegation and accountability between principals and agents (Strøm 2000: 266–8). Agency theorists usually discuss two main types of agency loss. Because of hidden information, principals may select agents who have preferences that are bound to conflict with theirs (problem of adverse selection). Because their action may also be hidden while in office, agents may not have been penalised for acting to the detriment of the principal's welfare (problem of moral hazard). Thus, the asymmetry of information between the principal and the agent allows the latter to engage in non-fiduciary behaviour (shirking) that is harmful to the principal and, at the same time, difficult to detect (Kassim and Menon 2003: 122). To prevent such behaviour, political actors are likely to design specific institutional rules and arrangements guiding delegation and accountability. These devices include both *ex ante* contract design and agent's screening, and *ex post* monitoring and sanctions (Pollack 1997: 108–9).

At first sight, the general framework of principal-agent theory seems appropriate to describe the content of the Lamfalussy reform. Broadly speaking, one could argue that, firstly, the Council (principal P_1) and the European Parliament (principal P_2) delegate implementing powers to the Commission (agent A) at L₂,²⁴ by assigning it the implementation of the regulatory measures decided at L₁, which also define the limits of this delegation. Structurally, this represents a case of dual agency (*d*), that is, an agency relationship where the agent has two principals (Gregory 2001: 14, 142).²⁵ Secondly, the Commission (while keeping its right of initiative) as a principal (P), delegates, at L₂, advisory and approval²⁶ tasks respectively to CESR and the ESC, which are involved in the definition of the technical measures of implementation. That level of delegation constitutes sub-agency (*s*),²⁷ in so far as CESR (sub-agent A₁) and the ESC (sub-agent A₂) are the agents of an intermediate agent, the Commission, and the sub-agents of ultimate principals, the Council and the European Parliament, to which they are accountable.²⁸ This is represented by Figure 2.

When looking more closely at the relationship between the actors, four questions arise regarding the appropriateness of the agency model as a tool with which to study the Lamfalussy process. *Firstly*, at L₂ the Commission is the agent of the Council and the European Parliament, which determine the limits of the delegated powers in the L₁ directive or regulation. Nevertheless, it has the right of initiative at L₁ and monitors the implementation at L₄. The Commission thus benefits from a substantial autonomy vis-à-vis its principals, which seems contradictory to the control dimension of the agency relationship.²⁹

Secondly, the Commission grants a mandate to CESR for advice on the drafting of technical measures. However, the Commission's means of control over CESR are relatively limited. As noted earlier, the political approach of agency identifies two types of *ex post* control of the agent: monitoring and sanctions.

In terms of monitoring, Commission representatives participate in the CESR expert groups during the preparation of the L2 advice, but their role consists in 'informing the members of the political priorities, discussing emerging ideas' (CWM 2001: 32), not in directing the drafting of the advice. This reduces the Commission's ability to take a monitoring role.

In terms of sanctions, four general means are at the disposal of the principal: unilateral refusal of compliance with the agent's decision; adoption of new legislation overruling the agent's action; dismissal or reappointment of the agent's personnel; and cuts in the agent's budget (Pollack 1997: 116–17). Firstly, the Commission can unilaterally refuse to comply with CESR's advice. Implementing measures are drafted exclusively by the Commission services, possibly without taking account of CESR's advice, which is not binding. However, this mechanism is less probable given that, on the one hand, the decision to resort to the Lamfalussy process is a Commission decision on account of its right of initiative at L1 and, on the other hand, this would jeopardise the smooth working of the implementation process on account of CESR's role at L3. Secondly, the Commission could submit to the Council and the European Parliament a new legislative proposal revising the content

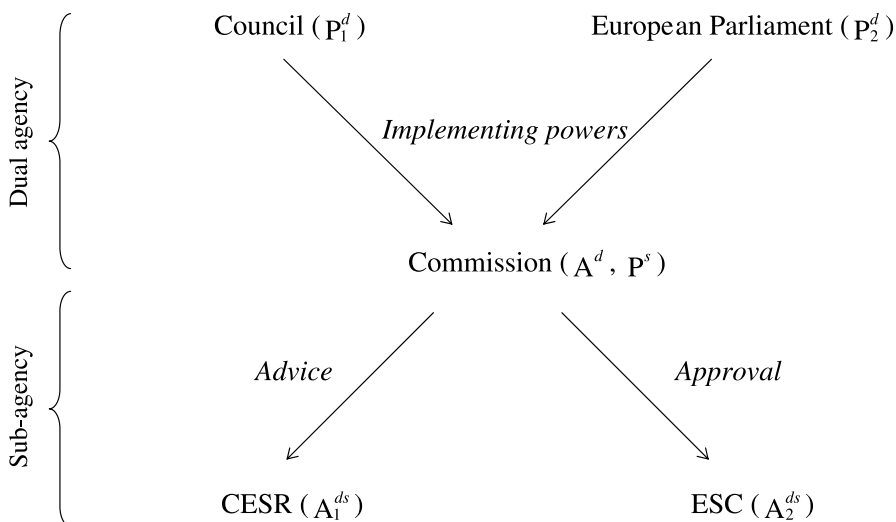


FIGURE 2. *A first look at the Lamfalussy reform (L1 and L2): agency relationship*

of CESR's advice. This control option is unlikely given that the Commission can simply refuse to comply with the advice. Finally, control by the Commission is also limited by the fact that it cannot dismiss or reappoint members of CESR and has no competence over its financing, which is provided by the member states (CESR 2006: Art. 8, §2). As a result, it is clear that CESR does not act as an agent of the Commission.

Thirdly, the Commission also delegates to the ESC³⁰ the approval of the draft implementing measures designed by the Commission after the advice of CESR (this is the function of the ESC as a regulatory committee), as well as the possibility of influencing the L2 mandates of CESR (CWM 2001: 29). The Commission has two means of controlling the ESC.

In contrast to its restricted monitoring role in CESR, the Commission's ESC representative, the director-general of the DG Internal Market, is the chairman of the Committee and submits draft measures to the Committee. This provides the Commission with a control mechanism over the ESC (Dehousse 2003: 802).

Of the four means of sanction the principal has over the agent listed above, the Commission can make use of only one in its dealings with the ESC: it can affect the latter's budget when it drafts that of the Community. As far as the other three measures are concerned, the Commission cannot simply disregard an unfavourable ESC vote on its draft measures, because under these circumstances these measures are automatically transmitted to the Council.³¹ Secondly, the Commission cannot overrule the decision of the ESC; it can submit a new legislative proposal, but this would have to be approved by the European Parliament as well as the Council. Finally, the Commission does not appoint the members of the ESC, who are representatives of the member states. In conclusion, control instruments of the Commission over the ESC exist, but are limited.

A general argument on comitology posits a reverse control relationship: that is, the direction of control is from comitology committees towards the Commission. This would weaken that conclusion. The rationale of this argument is that – given that all members of the comitology committees except the Commission representative are appointed by the member states and that the type of comitology procedure, leaving more or less autonomy to the Commission, is chosen by the Council and the European Parliament (Pollack 1997: 115) – these committees are police-patrol agents of the Council overseeing the Commission (Ibid.: 114; Dehousse 2003: 802).³² In 1962, the first year of comitology before the term had been coined, there was indeed rivalry between national administrations and the Commission (Bergström 2005:

54–6), but the situation quickly evolved towards co-operation. Data on the working of committees indicate only a very small number of referrals to the Council,³³ suggesting that comitology committees (including the ESC)³⁴ are not active watchdogs for the Council. Instead, they are pools of experts co-operating with the Commission, while providing, if needed, an institutional location in which member states may express their national interests (Dehousse 2003: 802). Therefore, the assumption of a sub-agency relationship between the Commission and the ESC is not invalidated in so far as there seems to be some control by the Commission through its chairmanship and its monopoly on the initiative at L2. In other words, the ESC can be considered an agent both of the Council (as a safety net for expressing vital national interests) and of the Commission (by approving its draft implementing measures and advising it on the L2 mandates of CESR).

Fourthly, the agency pattern does not cover one of the main innovations of the Lamfalussy reform, namely the role of CESR at L3, which is supposed to ‘act alone as a fully independent committee of national regulators’ (CWM 2001: 31). This leads us to the second mode of fiduciary delegation.

2. *Trust relationship*

The *trust* is a legal concept from equity (Hayton 2005: 9); it is applied in common law regimes and some variations can be found in civil law.³⁵ It can be defined as ‘the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose’.³⁶ The trust differs from agency in three notable aspects: the scope of the fiduciary relationship, the content of delegation and control over the fiduciary. Firstly, while the agent acts for the benefit of the principal, i.e. the one who delegates, the trustee, who is the equivalent of the agent, acts for the benefit of a beneficiary, not of the settlor, unless the latter is also the beneficiary. This implies that the intent of the settlor is not to obtain a return for himself/herself as is the case for the principal (DeMott 1998: 1039–40; Gregory 2001: 3; Pettit 2006: 16, 486), but to transfer that return to other persons (the beneficiaries). Secondly, what is delegated in the trust is not empowerment in an area, but management of property rights. Thirdly, whereas the control exercised over the agent by the principal/beneficiary is substantial (Gregory 2001: 14), the control exercised over the trustee by the beneficiary, joint trustees and, in some specific cases, the settlor is limited. Control in a trust mainly uses compliance with duties through suits, while control in agency also takes place through instructions from the principal (see DeMott 1999: 233, n. 3,

235–6; Hayton 2003: 75, 77, 84–8, 135–6; Pettit 2006: 29, 45–50, 53–4, 391; and Smith 2002: 1453, n. 219).

Applying the concept of trust to EU governance, Giandomenico Majone (2001: 113–16) argues that political property rights (policy-making rights), which include elements of national sovereignty, are transferred from the member states to Community institutions for the benefit of the former. This is the case for example with the European Central Bank, whose role consists in preserving the property rights of the member states in the area of monetary policy. Similarly, some provisions of the EC Treaty provide the Commission with property rights, such as the right of initiative, in order to safeguard the *acquis communautaire*. Majone adds that the main difference between the situation of the agent and the trustee is their level of independence with regard to the principal or settlor respectively.³⁷ Contrary to the agency relationship, where the agent's preferences must be in line with those of the principal in order to avoid or minimise agency losses, in the case of a trust relationship, these preferences have to be different from those of the settlor, to ensure the credibility of the policy proposals put forward by the trustee.

Based on this analysis, the trust approach can help understand the three unsolved problems mentioned above. Firstly, the apparent paradox of the Commission – being on the one hand controlled by the Council and the European Parliament when being delegated implementing powers at L₂ and, on the other hand, independent at L₁ and controlling the member states at L₄ – can be explained by the assertion of double mandate. The Commission fulfils two functions: one of agent of the Council (and thus the member states acting through that Community institution) and the European Parliament in a dual agency relationship at L₂, and one of trustee (T) of the member states (its settlors, S₁) at L₁ and L₄, acting for the benefit of the EU citizens and organisations (the beneficiaries, B) in a trust relationship (*t*).³⁸ This is illustrated in Figure 3.³⁹

Next, the role of CESR does not currently fit into the agency model on account of its independence from the Commission. This issue can be explained by looking at the role of CESR at L₃; the third problem, regarding the interpretation of L₃, can also be answered in this way. Firstly, CESR is made up of representatives of the national authorities for the regulation of securities, who are designated by the member states. Next, at L₃, those representatives exercise competences they have at the national level, i.e. setting up guidelines and regulatory practices for nationwide actors. As a result, it could be argued that the Committee plays a role of trustee (T₂) of the member states (its settlors, S₁), managing the assets that national regulatory competences constitute, for the benefit

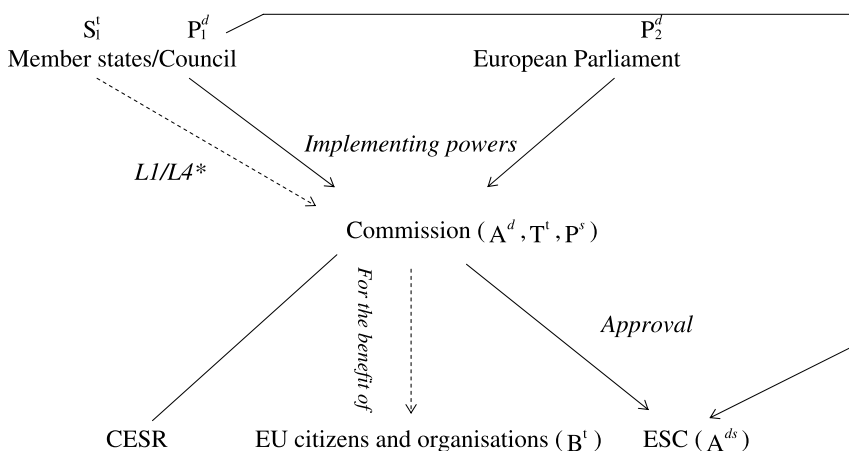
of market participants (practitioners, end-users and consumers – the beneficiaries, B_2). Figure 4 encapsulates this.⁴⁰

III Working hypotheses for the empirical analysis

It becomes clear from the preceding theoretical discussion that several hypotheses have to be taken into account when evaluating the potential benefits of the Lamfalussy reform. Our research has allowed us to further investigate these hypotheses regarding the benefits of the Lamfalussy reform (in this section) and to test them through an empirical analysis (in the next section). By benefits, we mean the potential contribution of the reform to the policy effectiveness in the securities sector as well as its consequences on the balance of power between the Community institutions.

1. The status quo hypothesis: member states' predominance

This first hypothesis could be referred to as the status quo option: some observers (Grossman 2004; Hertig and Lee 2003) are sceptical about the alleged benefits of the new framework. In their opinion, the Council and the European Parliament will continue to disagree on the principles and the scope of delegation to the Commission because financial regulation



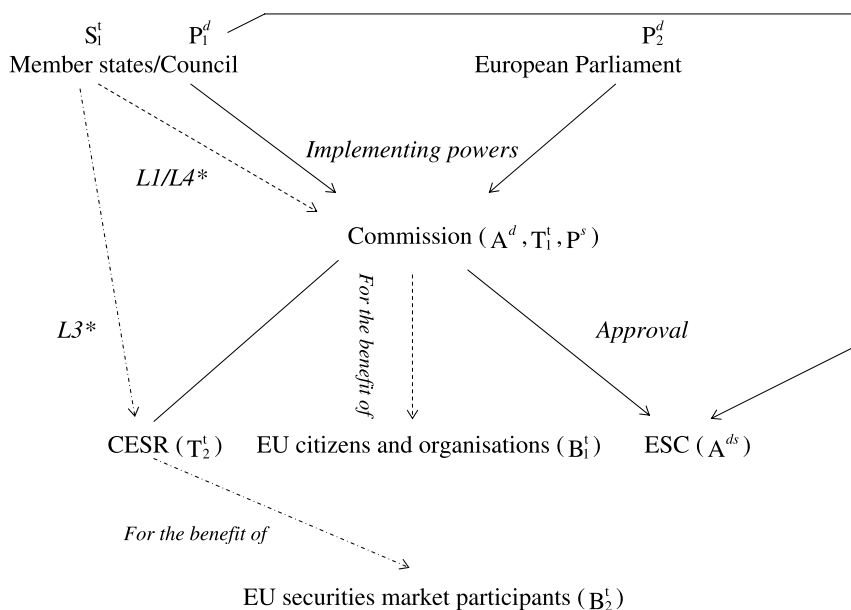
*L1: right of initiative

L4: monitoring of implementation

FIGURE 3. A second look at the Lamfalussy reform (L_1 , L_2 and L_4): trust relationship and revised agency relationship

remains a very sensitive issue in many national contexts. As a result, the comitology system will not function more rapidly or smoothly. On the contrary, with the aerosol clause, greater veto power is given to the Council to block the implementing measures of the Commission. Overall, the new process will not succeed in improving policy effectiveness – notably reducing excessive delays in the implementation of Community law – and the balance of power between the three main Community institutions will not change significantly since each will stick to its prerogatives.

The following arguments support this hypothesis. Firstly, it follows from the main objective of the new system in terms of speed and flexibility that excessive details should be avoided at L₁. The legislator (the Council and the European Parliament) should adopt general principles at L₁, leaving it to the Commission to decide on the technical details, after consultation with the ESC and CESR and informing the European Parliament. However, despite the fact that market actors have greater access to information through the consultation process organised



*L1: right of initiative

L3: national regulatory competences

L4: monitoring of the implementation

FIGURE 4. A third look at the Lamfalussy reform (all levels): revised trust and agency relationships

by the Commission at L1 and through CESR at L2, interest groups will probably continue lobbying at L1, aiming to have the technical details already regulated at that level. Secondly, although the global reaction to the new Lamfalussy process has been positive, it remains an open question how enthusiastic the member states really are about it. Thirdly, opening up the consultation process does not prevent member states from agreeing upon policy decisions before that process is closed as in the case of the Market Abuse Directive (Grossman 2004: 649).⁴¹ The IIMG also reports that market participants ‘want more transparency with regard to the Council and the European Securities Committee; two rounds of consultation; and more extensive and convincing feedback statements so that consultation is demonstrably a genuine dialogue’ (2004: 23).

2. The agency relationship hypothesis: Commission as agent, ESC as sub-agent

A second hypothesis – called the Lamfalussy hypothesis because it was the one the Group of Wise Men had in mind – consists in interpreting the Lamfalussy scheme purely and simply as a method of delegation in line with agency theory. The new four-level approach is expected to enhance the overall policy effectiveness in the securities sector, provided that the risk of agency loss is well under control. The argument of the Committee of Wise Men (CWM 2001: 24–5) is summed up as follows:

- (1) The legislative *process would speed up* – because the key Level 1 political co-decision negotiations between the Commission, the Council of Ministers and the European Parliament would focus solely on the essential issues and not on technical implementing details. As the section on Level 2 shows, the process of updating technical details would also be speeded up.
- (2) *The process would be democratic and flexible* – with the range and scope of implementing powers being defined by the Council of Ministers and the European Parliament by co-decision on a case by case basis for each Level 1 proposal.
- (3) *The EU institutions* would be able to benefit from the technical and regulatory expertise of European regulators, with the European Commission fully retaining its right of initiative.

As regards the balance of power, the new process is likely to strengthen the position of the European Parliament to some extent. As mentioned in section I, some safeguards have been built into the process at L2, in order to provide the European Parliament with control over the implementing measures (a three-month period in which to react to these measures, and

sunset clauses). The new reform of comitology, leading to the creation of a call-back right, seems to reinforce this shift of power towards the European Parliament.

3. *The trust relationship hypothesis: Commission and CESR as trustees*

A third hypothesis assumes that the Commission and CESR, or CESR alone, by increasing their autonomy, will in the long run move to a position as trustee of the member states. Two basic arguments are advanced to support this hypothesis.

One could reasonably expect that, in highly technical matters such as the securities markets, the experts of the Commission (DG Internal Market) will progressively form an 'epistemic community' with the national regulators and the market actors (Wilks 2005: 447), which will be on an equal footing with the member states and the European Parliament. The Lamfalussy process even reinforces this 'deliberative autonomy' since the Commission and CESR control the chain of command in the tasks of initiating, implementing and monitoring legislation. More generally, for Stephen Wilks (Ibid.: 439), the Commission as a guardian of the EC Treaty has gained considerable power so that it has become less vulnerable to the sanctions of its principals. Revising the agent's mandate could thus be very costly for them.

But one could take this approach a step further by putting forward that some political property rights have already been transferred from the member states to the Commission and CESR. Substantial powers have indeed been assigned to the Commission by the EC Treaty (right of initiative at L1, control of compliance with Community legislation at L4) in order to protect the interests of the EU citizens and organisations. We may also infer from the Lamfalussy structure that CESR has inherited some political property rights from the member states at the implementation level since CESR – instead of the national regulatory authorities – is supposed to play a significant role at L3. Moreover, as mentioned in section II, CESR does not actively behave as a guardian of national interests, but takes its decisions by consensus for the benefit of market participants.

In terms of policy effectiveness, a trustee relationship would probably produce effects similar to the second hypothesis (more transparency through extensive consultation, an increase in the speed of the decision-making process, etc.). But the balance of power in this case would probably be, as mentioned above, in favour of the Commission.

As a synthesis of this theoretical discussion, Table 1 indicates the impact of the Lamfalussy reform that can be expected from alternative theoretical approaches.

IV Empirical test of the hypotheses

In order to empirically test the plausibility of the three research hypotheses presented above, about fifteen interviews were conducted with representatives of CESR, the Commission (DG Internal Market), the Council, the ESC, the European Parliament and the IIMG, and with members of the permanent representations of four member states, selected according to the main schools of regulation. The topics discussed with these actors focused mainly on the actual relationships between the Community institutions, the ESC and CESR, and on the first tangible impacts of the Lamfalussy reform on the regulation of the securities markets (for instance, assessment of the decision-making process and outputs of the directives adopted after the Lamfalussy reform). In addition, a roundtable took place in Brussels with some of these representatives to draw out further details of their points of view. Evidence from the 2006 and 2007 reports of the IIMG and the first part of the Commission FSAP evaluation (Commission 2005b) was also added to these sources.

Firstly, and contrary to the expectations of the intergovernmentalist school of thought which predicted a failure in the implementation of the process (Hertig and Lee 2003: 364–70), there is now widespread agreement among the interested parties that the Lamfalussy approach has fulfilled its general purpose, providing an appropriate process for passing primary and secondary legislation in the securities field. The Lamfalussy process has created a political momentum that has speeded up the adoption of the FSAP, even if there are still several unresolved issues or criticism surrounding the new procedure. Similarly, the ongoing process has not strengthened the influence of the member states. For these reasons, the status quo hypothesis should be ruled out.

At this point, we suggest making a distinction between the policy outcome at L1 and L2 on the one hand, and at L3 on the other.

Secondly, evidence based on the four Lamfalussy directives seems to validate the second hypothesis, the agency relationship. Thanks to extensive and frequent consultation with experts, the Lamfalussy process

TABLE 1. Hypotheses on the implications of the Lamfalussy reform

Hypothesis/dependent variable	Policy effectiveness	Balance of power between EC institutions
Status quo: member states' predominance	Unchanged	Unchanged
Agency: Commission as agent, ESC and CESR as sub-agents	Increased	Tilted in favour of the European Parliament
Trust: Commission and CESR as trustees	Increased	Tilted in favour of the Commission

has indeed reduced the average time taken to negotiate and adopt the first framework directives at L₁, compared to the normal co-decision procedure (Commission 2005b: 11). In this sense, we may conclude that delegation has enhanced policy effectiveness in the securities sector.

According to Council and Commission officials, the adoption of the market abuse, prospectus and MiFID directives at L₁ went relatively swiftly. Thus, the Lamfalussy reform's positive results have included deep, technical, enlarged consultation within the decision process itself. If consultations make the decision-making process more transparent (almost anybody can voice an opinion when consultations are carried out), the downside is that there is a lot of information to be sorted out. A second problem in the new process is how to distinguish between framework legislation, which should be adopted at L₁, and technical measures, which should be adopted at L₂ (IIMG 2006: 9–10; Avgerinos 2002: 273–87). A third negative outcome is that, with the creation of the new regulatory procedure with scrutiny (see section I), the issue of the distinction between framework legislation and technical measures has been added, at L₁, regarding L₂ measures themselves. Indeed, the Council and the European Parliament, when co-deciding on a directive or regulation in the field, will have to determine, following the adoption of alignment proposals, whether or not measures implementing that L₁ instrument are to be considered of quasi-legislative nature or not.⁴² This approach is meant to ensure that the European Parliament, as a co-legislator, is on a par with the Council when the nature of the implementing measures legitimates its involvement with an eye on the institutional balance (Christiansen and Vaccari 2006: 13–14).

Things went equally smoothly at L₂, even in the case of the MiFID, given that projects of such magnitude usually either take ten years to be adopted or are never approved. It is worth noting that the Commission does not always closely follow the advice of CESR (IIMG 2006: 12, 26). For instance, in the case of the MiFID, the Commission decided to substantially change the advice because it was too long and too detailed to be incorporated in the directive.

The Lamfalussy reform did not seem, at first, to have changed the balance of power dramatically at L₁ and L₂. The European Parliament increased its control over the ESC through the institution of a three-month period to react to draft implementing measures and through sunset clauses, but cannot veto implementing measures. However, the institutional changes brought by the reform might have reinforced the determination of the European Parliament to request a greater involvement in comitology. The result was a call-back right for the implementing measures adopted under the regulatory procedure with scrutiny, which is

meant to be applied not only to the Lamfalussy directives, but also to other areas (other financial matters, environment, health and the movement of persons across borders). This provides the European Parliament with potentially substantial influence at L2. Nevertheless, it remains the case that the European Parliament is not directly involved in the working of the ESC and that it can be quite difficult for its members to scrutinise all the technical details of the securities legislation. Most interviewees think that it is in fact the Commission that has gained a great deal of power. At L1, it has the right of initiative; at L2, it has a preponderant role because it drafts the proposals, controls the consultation process and chairs the meetings of the ESC. Nevertheless, notwithstanding this increase in power, there can be no doubt that to a large extent the Commission remains accountable to its principals, namely the Council and the European Parliament, and that it should be considered an agent, not a trustee, of the latter.

In the third place, it is far more difficult to assess the validity of the trustee hypothesis, i.e. whether the Commission and CESR, or CESR alone, in fact, act as trustees of the member states at L3. The problem here is that the process is completely new and that, in future, CESR's autonomy vis-à-vis the member states will depend on several factors such as external events (competition between financial centres) and CESR's internal organisation and dynamics as well as its funding. CESR indeed reported to the IIMG 'difficulties related to a lack of means to finance cooperation tools foreseen in Level 1 legislation' (IIMG 2007: 12). In addition, even if the common approaches defined by the members of CESR already have an influence on day-to-day supervision, their effect is still not binding (CESR 2004: 10). Similarly, if CESR has started using majority rules,⁴³ development of its competences requires a proposal from the Commission to be adopted by the Council and the European Parliament (Ibid.: 3, 16–17). It is, however, uncertain whether member states are inclined to grant it additional competences and funding, and see it evolving into a European regulatory agency.

The increased autonomy of CESR is subject to both the will of the member states and the balance of power between Community institutions. Referring to the latter, the European Parliament has expressed concerns about the lack of transparency stemming from the 'discretionary' powers of CESR at L3 and has requested a strengthening of its oversight on the activities of the Committee. As a result, CESR accepted in September 2005 that it should regularly inform the Committee on Economic and Monetary Affairs of the European Parliament on its activities at L3 (European Parliament 2005). The DG Internal Market took account of that balance when mentioning in a working document on the application of the Lamfalussy process that '*Level 3 must evolve in*

a carefully modulated, open and transparent environment that fully respects Institutional boundaries and the importance of democratic accountability. CESR standards adopted at Level 3 must be fully compatible with – and cannot substitute for – binding EU legislation at Levels 1 and 2. They should not prejudice the political process, nor the Institutional prerogatives of the Parliament, the Council or the Commission' (Commission 2004: 10, point 31).

Conclusion

The three main innovations of the Lamfalussy reform are: firstly, the distinction between framework principles (L1) and implementing measures (L2); secondly, the creation of CESR and its systematic consultation of market actors at L2; and, thirdly, the introduction of a third level to ensure the consistent and equivalent implementation of securities legislation. Regarding the decision-making framework already present before the reform, our argument is that it resembles an agency relationship between the Commission on the one hand, and the Council and the European Parliament on the other. However, the Commission has another mandate towards the member states, that of trustee, consisting in exercising attributes of sovereignty (right of legislative initiative and implementation monitoring) for the benefit of EU citizens and organisations. Regarding the new elements of the process, the Commission sub-delegates to the ESC the right of advice on L2 mandates and approval of L2 draft measures; contrary to what has been contended, the ESC has the features not only of an agent of the Council, but also of an agent of the Commission. As regards the role of CESR, it turns out to be impossible to integrate into an agency model that has the Commission as a principal. We therefore suggest that it is appropriate to consider CESR to be a trustee of the member states, delegating to the Committee the management of 'regulatory assets' for the benefit of the market actors.

By introducing a new mode of governance, the Community institutions have succeeded in reducing to a large extent the backlog in the securities markets regulation. Co-operation with market actors and national supervisors has increased overall policy effectiveness. Empirical studies provided by the Commission (Commission 2005b) and the IIMG (IIMG 2003, 2004, 2006, 2007) suggest that the speed of the process has increased overall and that there are fewer bottlenecks than before in the different steps leading to the adoption of legislation. There is also more consistency in the proposals submitted by the Commission to the Council and the European Parliament, thanks to extensive consultation. In sum, the Lamfalussy process has brought about more transparency and more

expertise in the policy process and might also contribute to the emergence of a common culture of supervision in the securities sector. As far as benefits for the markets are concerned, the policy effectiveness and political momentum created by the institutional reform should be considered in parallel with the increased efficiency of EU securities markets – measured by their innovation capacity⁴⁴ – which was generated by the deregulatory content of the Community policy itself (Gkantinis 2006: 3–5, 19, 22–7, 48, 52), developed following the White Paper on the Internal Market (Commission 1985: 29).

The Lamfalussy reform proposed a new process and is recent. We are aware that our assertions on policy effectiveness and balance of power thus remain debatable. The system is still in flux, as indicated by the blurring of the boundary between L₁ and L₂ in the activities of CEIOPS (in the framework of the Solvency II project); the IIMG wondered whether in future L₃ committees should be empowered to propose amendments to legal texts (IIMG 2007: 3, 15). This observation also emerges from the various questions that are still unsolved at all four levels (Ibid.: 1, 4–15). Among these questions, two can be singled out. Firstly, resourcing has arisen as an important issue in the functioning of CESR, the IIMG emphasising that *‘the budget constraint appears to be real and a prerequisite for further development is that it is solved’* (Ibid.: 12).⁴⁵ Additional financial means for CESR, and more generally for L₃ committees, could indeed contribute to the overcoming of distrust between member states, and ensuring a co-operative relationship between the Commission and these committees.

Secondly, the new call-back right raises the question of whether it will have an impact on the functioning of the Lamfalussy structure and, more broadly, the Community process, either through its effective use or through disputes on its choice in legislative instruments. That impact depends on whether the European Parliament will in future use its new right actively, as it did with the right of co-decision, or less frequently, as it did with the right of scrutiny. Indeed, the European Parliament fully used its new right of co-decision to gain new powers in comitology, namely the right of scrutiny (Bergström 2005: 219–71). However, the use it has made of this right has been limited.⁴⁶ As contemplated in a GAIN report of the United States Department of Agriculture (USDA 2006: 5), the European Parliament could threaten to use its new comitology right if the Commission does not change its plans to draft implementing measures giving food companies two years to adapt their nutrition and health claims aimed at children to the new rules of Regulation 1924/2006/EC of 20 December 2006 (Art. 14, §1) (Taylor 2007).⁴⁷ The Commission alignment proposal required to grant the European Parliament a call-back right in that regulation has not yet, however, been

adopted.⁴⁸ The next steps in this dispute will indicate towards which kind of use the European Parliament is heading.

NOTES

1. The authors would like to thank Alexandre Lamfalussy, Jörn-Carsten Gottwald, Daniel Mügge, Emiliano Grossman, officials of the Commission and the Council, members of the Committee of European Securities Regulators, of the European Parliament and of European permanent representations to the European Union, and the *Journal of Public Policy* peer-reviewer for their helpful comments.
2. The single market was almost achieved for the banking sector, some barriers remaining to the provision of cross-border services and the implementation of Directive 94/19/EC being delayed until 30 June 1995. As far as the insurance sector is concerned, it was achieved in most member states on 1 July 1994, thus with a delay of eighteen months. The investment services sector was the last sector in which integration was achieved, with a delay of three years. Compliance with the last directive adopted (Directive 93/22/EEC) was required by 31 December 1995.
3. The group was created in January 1999 at the request of the European Council of Vienna. It was composed of personal representatives of the EU finance ministers and of the European Central Bank, of the director-general of the Directorate General (DG) G – Economic and Social Affairs of the Council, and of the internal market commissioner, which held the chairmanship.
4. This committee was to be set up in accordance with Article 7, §1(b) of Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.
5. 'Mostly' because the final report of the Committee of Wise Men as adopted by the European Council was slightly revised; an 'aerosol clause' was introduced (see section I) (Lamfalussy 2001: 9, 26, 28).
6. The European Parliament 'recommends that the "better regulation" programme be piloted in certain fields and be carefully assessed before wider use; considers the experience with the Lamfalussy procedure in financial markets legislation, and the dialogue between regulators and market participants, in particular, to be a valuable test case for a dynamic legislative process' (European Parliament 2004: point 4). It should, however, be stressed that the Lamfalussy approach 'is not the result of putting into practice pre-conceived ideas about the generally desirable features of European governance' (Lamfalussy 2001: 27) and was thus not initially meant to be extended to other policy areas.
7. The term *delegation* will be used in a non-juridical sense, to refer to the general transfer of tasks.
8. For practical reasons, we use the term *level* according to the original language of the Lamfalussy reform. However, the four levels identified in the Community vocabulary correspond de facto to the subsequent phases of the classic policymaking cycle.
9. *Comitology* refers to the procedures used for the exercise of implementing powers granted by the Council to the Commission, assisted by a committee, in accordance with Article 202, third indent, of the Treaty establishing the European Community (EC Treaty) as revised by the Treaty of Nice.
10. See the end of this section on changes brought by Council Decision 2006/512/EC.
11. Comitology includes four procedures: an advisory procedure, a management procedure, a regulatory procedure and a regulatory procedure with scrutiny. This last procedure was added by Council Decision 2006/512/EC. The ESC is then meant to become a 'regulatory procedure with scrutiny committee' in the 'Lamfalussy directives'.
12. Two formal contact committees existed: the Securities Contact Committee (1979) and the Undertakings for Collective Investment in Transferable Securities (UCITS) Contact Committee (1985) (Commission 2000b: 32, 36–40, 58; Moloney 2002: 851–2, 856). Both committees had an advisory function. The Securities Contact Committee had a comitology function (Directive 79/279/EEC, Art. 21), which was never exercised. Similarly, the UCITS Contact Committee was given a comitology function in 2001 (Directive 2001/108/EC, Art. 2, §22); however, it only held one meeting in 2004, without adopting implementing measures (Commission 2003b: 43–4; 2005d: 26). Its functions were later transferred to the ESC (Commission 2006a: 28; Commission Decision 2004/8/EC, Art. 1).
13. Website of the European Commission – Prelex, ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=195996.
14. 'Given the fact that the Council of Ministers, European Commission and the European Parliament have equivalent stakes in the process, the Committee suggests that the Monitoring Group should be

- composed of two external nominees (i.e. not drawn from the membership of the Institutions) of the Council, European Parliament, and the European Commission' (CWM 2001: 41).
15. There was opposition, notably from the German government, regarding the unchanged application of the comitology procedure to L2 (Quaglia 2007: 278).
 16. 'From a historical point of view, predominant views might be interpreted as a simple majority of Member States. For the time being, this is not established in law' (IMG 2003: 40).
 17. This is in accordance with the agreement between the Commission and the European Parliament in Decision 1999/468/EC (Commission 2000a: points 6 and 7).
 18. 'The rejection of the proposed Constitutional Treaty in France and the Netherlands has implications for the Lamfalussy approach . . . in that it delays an *institutional solution* to the European Parliament's request to have equivalent control powers as its co-legislator' (Commission 2006c: 3).
 19. A group called 'Friends of the Presidency' was set up by the British Presidency of the Council in September 2005 to discuss the reform of comitology (Commission 2006b: 8). The idea of this reform is not connected to the Lamfalussy reform; it was initiated by the Commission in its White Paper on European Governance (Commission 2001a: 31).
 20. These deadlines can be extended by one month or curtailed on the grounds of efficiency or urgency.
 21. 'However, where an adaptation is necessary within a specified period, the European Parliament, the Council and the Commission consider that a clause requesting the Commission to submit a proposal to revise or abrogate the provisions concerning the delegation of implementing powers could strengthen the scrutiny exercised by the legislator' (Commission 2006d: point 3).
 22. The term *person* refers both to natural and legal persons (Gregory 2001: 23–4).
 23. A *fiduciary relationship* is a relationship in which 'one party (the "fiduciary") acts on behalf of another party (the "beneficiary") while exercising *discretion* with respect to a *critical resource* belonging to the beneficiary' (Smith 2002: 1402). The 'on behalf of' characteristic distinguishes a fiduciary relationship from other delegation relationships. For instance, the landlord–tenant relationship contains the two other characteristics: discretion of the tenant over a critical resource of the landlord, the rental property. However, the tenant does not manage the property primarily for the benefit of the landlord (Ibid.: 1402–3).
 24. Implementing powers are conferred on the Commission by the Council – not by the European Parliament (Art. 202, third indent of the EC Treaty) – acting according to the procedure laid down in the Treaty for the matters dealt with, here the co-decision procedure. This procedure means that, although the Council can choose to delegate implementing powers or not, it has to reach an agreement about that choice with the European Parliament (Commission 2002c: 2). Failing such agreement, the L1 measures cannot be adopted.
 25. *Dual agency* is a case of what the political economy literature calls 'common agency', i.e. 'a multilateral relationship in which several principals simultaneously try to influence the actions of an agent' (Dixit, Grossman and Helpman 1997: 752). In that conceptual framework, the Lamfalussy process involves a delegated common agency, where 'several parties voluntarily . . . bestow the right to make certain decisions upon a single (common) agent' (Bernheim and Whinston 1986: 923).
 26. *Approval* differs from *adoption*: the ESC delivers an opinion on the draft implementing measures drawn up by the Commission. The latter then adopts them if the opinion is positive, in accordance with the regulatory procedure (with scrutiny).
 27. A *sub-agent* is 'a person appointed by an agent . . . empowered to do so, to perform functions undertaken by the agent . . . for the principal . . . but for whose conduct the agent . . . agrees with the principal . . . to be primarily responsible' (Restatement (Second) of Agency, §5, quoted in Gregory 2001: 6).
 28. 'The sub-agent differs from other agents only in that he acts for and has duties of loyalty to two principals [intermediate agent and ultimate principal] who do not employ him jointly' (Gregory 2001: 109).
 29. 'Control is a defining feature in the legal definition of agency. A principal has the right on a continuing basis to control the methods by which the agent achieves results, as opposed to the right simply to assess the results achieved against benchmarks established by contract' (DeMott 1999: 233).
 30. The fact that the ESC exercises the role of a regulatory committee is decided by the Council and the European Parliament in each Lamfalussy directive (Commission 2003a: 1, 3). The Council and the European Parliament, as ultimate principals, thus give their consent to the sub-agency as regards both its existence and its functions. The first Lamfalussy directive – on market abuse (Directive 2003/6/EC) – entered into force on 12 April 2003, and therefore the ESC had worked

- as an advisory committee to the Commission at L1 until then (IIMG 2003: 15–16) before starting exercising its ‘central role’ of regulatory committee (CWM 2001: 29).
31. Moreover, if the Council does not manage to achieve a qualified majority of votes either to approve or to indicate its intention to oppose the draft measures within the deadline set in the basic instrument, the Commission has committed itself not to adopt the measures if there are ‘predominant views’ against them in the Council (aerosol clause). With the future replacement of sunset clauses by the regulatory procedure with scrutiny, the European Parliament may, if there are no predominant views within the Council, oppose the draft measures, which would then not be adopted (Council Decision 2006/512/EC, Art. 1, §7). This is unlikely, however, given that, to approve the L1 measures previously, the Council would have had to gather a qualified majority of votes.
 32. *Police-patrol oversight* can be defined as the examination by the principal of ‘a sample of the executive agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations’ (McCubbins and Schwartz 1987: 427).
 33. Regarding the management procedure, from 1962 to 1978, less than 0.05 per cent (8 of 16,258) of the votes taken by the agricultural management committees led to a referral to the Council. The Commission reported that this trend was confirmed by later statistics, specifying that no negative opinions were delivered in 1987 and 1988. Subsequent data for the year 1995 showed no negative opinions in 2,231 draft implementing measures (Commission 1989: 9; 1996: 6). Regarding the regulatory procedure, around 2 per cent of the implementing measures drawn up in 1987 brought about referrals to the Council. The percentage was 1.25 per cent for 1995 (Commission 1989: 8–9; 1996: 6). From 2000 (the beginning of annual reports on the working of comitology committees: Decision 1999/468/EC, Art. 7, §4) up to and including 2005, there have been fifty-one referrals of implementing measures, to be adopted under both the management and regulatory procedures (the data do not distinguish between the two), to the Council. In percentage terms, the referrals have not exceeded 1 per cent of all such measures; in 2003 the figure decreased to none (Commission 2002c: 3; 2003a: 3; 2003b: 18; 2005a: 3; 2005c: 6; 2006b: 6).
 34. All implementing measures adopted by the Commission in the Lamfalussy process, up to and including 2005, have received favourable opinions from the ESC (Commission 2005a: 30; 2005d: 26; 2006a: 27; see also 2006c: 5).
 35. For instance, the *Bewind* in Dutch law and the *Treuhand* in German law (Witz 1991: 11–14).
 36. Convention on the Law Applicable to Trusts and on Their Recognition, Art. 2.
 37. In that sense, D. J. Hayton describes the borderline between trust and agency as ‘when the settlor’s influence or control is so excessive that the trustees must in substance be treated merely as agents administering and distributing his property as he wants’ (2003: 136).
 38. ‘The Commission is an agent when it exercises implementing powers delegated to it by the Council’; it is a ‘trustee of the member states when it exercises certain powers expressly granted to it by the treaties, such as agenda-setting, ensuring compliance with EC law, or issuing directives and decisions without the Council’s approval under Article 86(3) (ex Article 90(3)) of the EC Treaty’ (Majone 2001: 114).
 39. No arrow is included in the relationship between the Commission and CESR due to our conclusion in section II.1 that CESR is not an agent of the Commission.
 40. CESR is considered a trustee of the member states, rather than an agent of the Commission: hence the absence of arrow in its relationship with the latter.
 41. In the explanatory memorandum for its proposal, the Commission indicated that, ‘in view of the urgency of action in the area of market abuse, and in view of the extensive consultations on the issue already carried out with Member State governments, regulators and supervisors, financial industry (Forum Group meetings) and other interested parties, the Commission has decided to come forward with the proposal now rather than to delay it through recourse to a more formal consultative process. In line with the report of the Wise Men, the Commission will engage in consultations, as foreseen in the Stockholm European Council resolution, when it prepares the implementing measures in accordance with the relevant provisions of the proposed Directive’ (Commission 2001b: 5). The Economic and Social Committee reacted by saying that ‘the Directive itself fails to meet one of the most important elements of the Lamfalussy Recommendations. This is that consultation with market practitioners and other interested parties should be open and continuous throughout the legislative process. This was not done in the case of this Directive’ (Commission 2002b: point 3.2.).
 42. The 2006 decision holds that measures to be adopted under the regulatory procedure with scrutiny are ‘measures of general scope designed to amend non-essential elements of a basic instrument

- adopted in accordance with the procedure referred to in Article 251 of the Treaty [co-decision procedure], including by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements' (Council Decision 2006/512/EC, recital 3). Measures seeking to amend essential elements of the legislative act can only be adopted by the legislator on the basis of the Treaty (Art. 1, §2).
43. CESR's charter holds that, 'when delivering advice to the European Commission, the Committee may vote according to the qualifying majority vote in the Council if the Chair considers that there is a split of views or if one or more members ask for a vote', and that, 'for Level 3 work explicitly requested from CESR by Community legislation or directly related to Community legislation, unanimity is required if one or more members so wishes' (CESR 2006: Art. 5, §§6 and 7 respectively).
 44. 'Trading has become automated in all major European exchanges, which have converged in a common, and arguably efficient, trading model. To finance their investment in trading technology, European exchanges have become for-profit corporations and have often sought a listing in their markets. They have expanded their reach beyond their local jurisdiction by engaging in mergers and alliances, and they have diversified their businesses by establishing derivative trading facilities' (Gkantinis 2006: 48).
 45. 'The other Level 3 Committees indicated that similar financing issues have not arisen in their sectors' (IIMG 2007: 12).
 46. Since its creation in 1999 (Council Decision 1999/468/EC, Art. 8), the right of scrutiny has been used only twice: once in 2000 (Commission 2002c: 3) and once in 2005 (Commission 2006d: 4–5). Even when taking into account the three other cases where the European Parliament considered that the Commission had exceeded its implementing powers without referring to Article 8 of the above decision (one case in 2004 and two in 2005: see Commission 2005c: 5–6 and 2006d: 5–6 respectively), the total number of cases amounts to 5 of around 15,000 implementing measures, adopted from 2000 up to and including 2005 (see section II.1).
 47. The European Parliament favours a six-month period.
 48. As of 19 July 2007, the common position of the Council is pending (Website of the European Commission – Prelex, ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=194788).

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